In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1238

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A3–A7) is reported at 406 F. 2d 247 and its opinion on rehearing (Pet. A1–A2) is reported at 406 F. 2d 250. The opinion of the district court (Pet. A9–A16) is reported at 287 F. Supp. 681.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1968 (Pet. A8). Petitioner's petition for rehearing was denied on January 28, 1969 (Pet. A1–A2). The petition for a writ of certiorari was filed on April 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

359 209—69——1

QUESTION PRESENTED

Whether a decedent's estate is entitled to a marital deduction under Section 2056 of the Internal Revenue Code of 1954 when the surviving spouse is given a life estate in the decedent's property with power to consume the property for his own benefit or to give it to "public charities," but is otherwise without power to give it away and is without power to dispose of it by will.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 8–10.

STATEMENT

Petitioner brought this suit in his capacity as executor of the estate of his wife, Mary Todd Batterton, who died on April 21 1962 (Pet. A4, A11). On May 3, 1954, petitioner and his wife executed mutual wills under which each gave his property to the survivor with remainder to the United Christian Missionary Society. They simultaneously entered into a contract whereby neither would, without the other's consent, revoke or change his will, and neither would make any inter vivos gift or transfer of his property without fair consideration, except to public charities (Pet. A3–A4, A9–A11). Under Florida law,[1] the surviving spouse was the recipient of a life estate with the right to use as much of the decedent's residuary estate for his own benefit as he found necessary or desirable dur-

[1] Florida law applies since the decedent died a domiciliary of Florida and the wills and contract were executed there (Pet. A4, A9–A11, A13).

ing life and the power to donate to public charities as much of the decedent's estate as he deemed desirable. However, the surviving spouse had no right to donate the decedent's residuary estate to private individuals, and was free to leave it by will only to the United Christian Missionary Society.[2]

In the federal estate tax return filed for the decedent's estate, petitioner claimed a marital deduction of one-half the gross estate, or $131,025.91. The Commissioner of Internal Revenue disallowed the deduction on the theory that the interest passing to the decedent's surviving spouse was a terminable interest under Section 2056(b)(1) of the Internal Revenue Code of 1954 (Pet. A11–A12). In petitioner's negotiations with the Internal Revenue Service, he claimed that the estate should be allowed either a marital deduction or a charitable deduction (Pet. A12). The Commissioner did not allow the charitable deduction on the grounds that the value of the interest that might go to charity could not be ascertained (Pet. A12, A15).[3]

In the refund suit which followed, the district court sustained the Commissioner's position (Pet. A14–A15). The court of appeals affirmed (Pet. A3–A7). In its petition for rehearing before the court of appeals, petitioner asserted that the surviving spouse could only give property he did not consume to chari-

[2] Petitioner does not dispute in this Court the holdings of the court of appeals and the district court under Florida law. (Pet. 4.)

[3] Petitioner now concedes that the estate is not entitled to a charitable deduction under Section 2055 of the 1954 Internal Revenue Code (Pet. 13).

ties qualified to receive bequests that are deductible under Section 2055, and that for this reason a marital deduction should be allowed under Section 2056. The court of appeals denied this petition, reasoning that petitioner's (Pet. A2) "contractual and testamentary requirements as to his disposition of this estate could have been fully carried out without his ever naming a charity meeting the statutory exemption standards at all."

ARGUMENT

The decision below is correct and there is no conflict of decisions or any other ground for further review.

1. Sections 2056 (a) and (c) of the Internal Revenue Code of 1954, Appendix *infra*, pp. 8, 10, allow a deduction from the gross estate of a bequest to the decedent's surviving spouse, up to one-half the value of the adjusted gross estate. Under Section 2056(b), however, the deduction is unavailable if the interest passing to the surviving spouse is a terminable interest, *i.e.*, a life estate or some other interest that terminates "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur * * *". A statutory exception to the terminable interest rule is set forth in Section 2056(b)(5). It allows the marital deduction if the surviving spouse receives a life estate coupled with a power of appointment over the corpus that he may exercise "alone and in all events" in his own favor or in favor of his estate. The purpose of Section 2056 (b)(5) is to treat equally those spouses who have virtual ownership of the property for their life and those who are fee owners of the property. See S. Rep.

1013, Part. 2, 80th Cong., 2d Sess., pp. 16–17; see, also, Section 20.2056(b)–5(a) and (g) (2) and (3) of the Treasury Regulations on Estate Tax. Thus the marital deduction is available if the surviving spouse is given either the right to treat the property entirely as his own during his lifetime or the unrestricted power to dispose of it by will as he sees fit. See Regulations Sections 20.2056(b)–5(g)(5).

Although Mrs. Batterton's will allows petitioner more powers over the corpus than accompany a simple life estate, he was under an obligation not to alienate the property during his life without fair consideration except for gifts for "public charities". Since he therefore is not given the unqualified right to deal with the property as his own during his lifetime, he did not have the unrestricted rights that in the first instance would qualify for a marital deduction. This, coupled with the contractual restriction that required him to will the property to the United Christian Missionary Society, meant that he did not have the type of power of appointment that would qualify an otherwise ineligible life estate for the marital deduction under Section 2056(b)(5). In short, he was granted neither lifetime nor testamentary powers that give rise to the level of virtual ownership required for the marital deduction, and the court of appeals correctly ruled that the deduction is unavailable.

2. Petitioner's argument here, like his petition for rehearing in the court of appeals, proceeds in two stages. First it is claimed that the provision limiting petitioner's inter vivos gifts of his wife's estate to amounts given "public charities" should be inter-

preted as requiring that the gifts be to such charities as would be eligible to receive bequests deductible under Section 2055 of the Internal Revenue Code. The second point is that Section 2056 should be interpreted to allow a marital deduction in this case if the phrase "public charities" is restricted to organizations qualifying under Section 2055.

Even assuming that the court of appeals erred in holding that the phrase "public charities" encompasses a broader class of organizations than those qualifing under Section 2055, petitioner would still have no statutory basis for a marital deduction. Section 2056 allows the marital deduction only if the surviving spouse has a fee interest or a life interest coupled with a power of appointment over the corpus exercisable "alone and in all events" during his life or at his death. Although Section 2055 allows a deduction for bequests to qualified charities, including bequests of remainders, Section 2055 does not apply here since, as the petitioner expressly concedes (Pet. 13), "the value of the charitable remainder is not presently ascertainable. *Merchants National Bank of Boston* v. *Commissioner,* 320 U.S.. 256".[4] The very fact that petitioner's power to give the property away was restricted to gifts to "public charities" strips him of the legal or virtual ownership of the fee that, under Section 2056, is the prerequisite to the marital deduction, and the more circumscribed the group of organi-

[4] See, also, *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187; *Henslee* v. *Union Planters Bank*, 335 U.S. 595; *Humes* v. *United States*, 276 U.S. 487; 4 Mertens, *Law of Federal Gift and Estate Taxation* (1959), pp. 397–398; Section 20.2055–2(a) of the Treasury Regulations on Estate Tax (1954 Code).

zations which may be included in the phrase "public charities", the more antithetical the situation is to the language and purposes of Section 2056. The will-cum-contract here simply fails to comply with the statutory terms and therefore no marital deduction is available.

3. The disposition of this case turns entirely on the language of two instruments—a will and a contract—that are peculiar to this case. We are aware of no other matter where a comparable problem is presented. Therefore, this case does not have the general importance that would warrant review in this court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JONATHAN S. COHEN,
DAVID ENGLISH CARMACK,
Attorneys.

MAY 1969.

APPENDIX

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are as follows:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such

termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * *

(26 U.S.C. 2056.)